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Plaintiff's Brief in Opposition to State's Motion to Exclude Reference to Prior Judicial Proceedings and for Preliminary Jury Instruction

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2001 FEB -7, P 4:06 IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

2001 FEB -3 P 3:57

CUYAHOGA COUNTY
PROSECUTING ATTORNEY

ALAN DAVIS, Special Administrator
of the Estate of
SAMUEL H. SHEPPARD

Plaintiff

vs.

STATE OF OHIO

Defendant

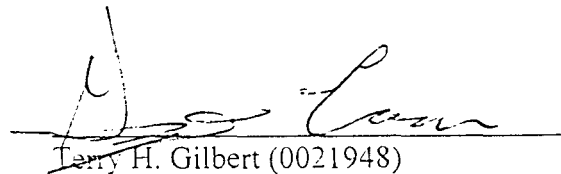
Judge Ronald Suster

Case No. 312322

PLAINTIFF'S BRIEF IN
OPPOSITION TO STATE'S
MOTION TO EXCLUDE
REFERENCE TO PRIOR
JUDICIAL PROCEEDINGS
AND FOR PRELIMINARY JURY
INSTRUCTION

Plaintiff hereby opposes the motion of the Defendant State of Ohio, to preclude the parties from comment or discussion of the prior judicial proceedings in this case, and requesting a preliminary jury instruction. The reasons and authorities for denying the Defendant's motion are set forth in the attached brief in support, which is hereby incorporated by reference.

Respectfully submitted,



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Attorneys for Plaintiff

BRIEF IN SUPPORT

I. Background

Defendant has moved the Court to give a preliminary jury instruction instructing the jury on the procedural background of the various cases involved here, and thereafter, to exclude any reference to those proceedings in prior courts. Although Plaintiff does not object to the giving of a preliminary jury instruction in principle, the State's proposed instruction is both biased and insufficient, and that precluding any reference to prior judicial proceedings would prejudice Plaintiff to an irreparable extent.

II. Law and Argument

The State's argument is premised on potential bias to the jury from the introduction of evidence of prior tribunals: *i.e.*, that the jury will be unable to act *de novo* if the parties are allowed to refer to and discuss the proceedings preceding this action, specifically the State's criminal prosecution of Dr. Sheppard, which generated several reported opinions. *State v. Sheppard*, 100 Ohio App. 399, 128 N.E.2d 504 (1955); 164 Ohio St. 428, 131 N.E.2d 837 (1956); 97 Ohio App. 493, 124 N.E.2d 730 (1955); 100 Ohio App. 345, 128 N. E. 2d 471 (1955); 165 Ohio St. 293, 135 N. E. 2d 340 (1956); 352 U.S. 910 (1956), Dr. Sheppard's later petition for a writ of *habeas corpus* from the federal courts, reported at *Sheppard v. Maxwell*, 231 F. Supp. 37 (S.D.Ohio 1964); 346 F.2d 707 (6th Cir. 1965); 382 U.S. 916 (1965); 384 U.S. 333 (1966), and Dr. Sheppard's continued prosecution in the state courts, which resulted in his acquittal by a jury.

In support of this theory of bias caused by the submission of prior proceedings, the State cites *Jones v. Keller*, 9 Ohio App. 2d 210, 38 Ohio Op. 2d 217 (1966), in which the appellate court reversed a *de novo* workers' compensation trial because the trial judge had made a "pointed

disclosure of the results of previous hearings" that was "repugnant to the concept of a trial *de novo*." *Id.*, 38 Ohio Op. 2d at 219. No other authority is cited for the State's proposition.

Reliance upon *Jones v. Keller* is inapposite, as the trial court reversed because of an erroneous statement *by the trial judge*, not by the *parties*. If the State were actually attempting to follow *Jones*, it would not have proposed "that the Court provide a preliminary instruction to the jury including a simple statement of the procedural history of the case and an explanation of wrongful imprisonment proceedings." State's Motion, at 5. Instead, the State would have urged that *no* reference be made, even by the trial judge, to prior decisions of prior courts.

For larger reasons, though, the State's motion should be denied. First, the wrongful imprisonment statute, as the State notes, requires a *different ground for decision* than a criminal acquittal. In *Chandler v. State*, 95 Ohio App. 3d 142, 149 (1994), cited by the State in its motion, the previous criminal acquittal "is not given preclusive effect" in a wrongful imprisonment case. Thus, no bias can result from the jury learning that a previous jury found a reasonable doubt as to Dr. Sheppard's guilt; the decision before this jury rests on different principles.

Similarly, the wrongful imprisonment scheme specifically allows for the introduction of prior proceedings. In *Chandler*, "the trial court had before it the transcript of the proceedings that resulted in appellant's conviction." *id.* at 149, and the Ohio Supreme Court has noted that a new trial in a wrongful incarceration action is necessary because "the state has not had a full and fair opportunity to litigate the issue of . . . innocence because it cannot seek correction of errors by the trial court which might have led to erroneous acquittals," *Walden v. State*, 47 Ohio St. 3d 47, 52 (1989), which clearly implies that evidence from the original criminal action should be reconsidered, and even criticized, during a wrongful imprisonment case, in order for both parties

to argue its significance, or any possible error made in the criminal proceeding that resulted in conviction and imprisonment.

Indeed, the statute itself requires a Plaintiff to prove that his "conviction was vacated or was dismissed" and that no further appeals are available to the State, R.C. § 2743.48(A), and even when a party offers to stipulate to an element of its opponent's case, the court need not accept such a stipulation, *State v. Thompson*, 46 Ohio App. 3d 157, 159 (1988).

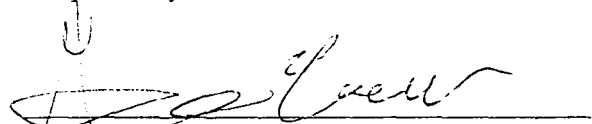
Here, Plaintiff's case would be prejudiced if he is not permitted to reference and comment upon prior proceedings involving Dr. Sheppard. As stated by Justice Robie Resnick in *Walden*, *supra*, the "best known and most serious cases of erroneous confinement result from the conviction of the innocent. Some of the more common factors known to have been responsible for persuading the finder of fact of the guilt of an innocent man include misidentification, circumstantial evidence, frame-ups, overzealous police or prosecutors, prior convictions or unsavory records, community opinion demanding a conviction, and unreliability of expert evidence." *Walden*, 47 Ohio St. 3d at 56-57. In this case, the parties must be able to comment on the prior court proceedings involving Dr. Sheppard, and argue to the jury their relative importance in determining whether Dr. Sheppard committed the crime for which he was imprisoned. Exclusion of reference to these proceedings would frustrate both the Rules of Evidence, *see* Ohio R.Evid. 201, 803(8), 803(16), 803(18), 803(21), 902, 1003, 1005; and the Rules of Civil Procedure, *see* Ohio R.Civ. P. 44(A), 44.1(A), 54(A), 58(C).

Finally, the State has already announced its intention to use portions of these prior proceedings as evidence in the case at bar. To allow the use of this testimony without allowing the parties to reference or comment upon the proceedings themselves would stretch the bounds of reason.

III. Conclusion

The State seeks to exclude reference to prior proceedings not because the jury might be prejudiced or confused by consideration of proceedings that have a bearing on the case at bar, but because they seek to prevent Plaintiff from mentioning the fact that the State of Ohio has been held to have acted wrongfully. Therefore, instead of the preliminary instruction proposed by the State, Plaintiff proposes that an instruction be given that not only educates the jury about the basic framework of the case and the burdens of proof, but also allows the jury to consider what happened in prior court proceedings, as is contemplated by the Rules of Evidence and the established caselaw governing wrongful imprisonment actions.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Terry H. Gilbert", written over a horizontal line.

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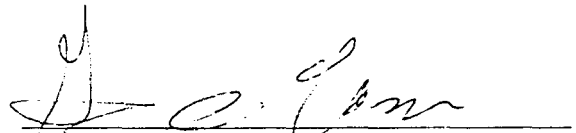
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Attorneys for the Plaintiff

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Brief in Opposition to the State's Motion to Exclude Reference to Prior Judicial Proceedings and for Preliminary Jury Instruction has been served on William Mason, Prosecuting Attorney, Justice Center, 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 2nd day of February, 2000.


George H. Carr (0069372)
Attorney for Plaintiff